FILED
SEP 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-390

CITY OF ANNISTON, ALABAMA, et al.,
Petitioners,

versus

MACK SCOTT, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD B. EMERSON
Post Office Box 1850
Anniston, Alabama 36202
Telephone: (205) 237-9586

JOHN R. PHILLIPS
8th Floor Commercial
National Bank Building
Anniston, Alabama 36201
Telephone: (205) 237-7556

Counsel for Petitioners

September ____, 1979

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1811

INDEX

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 3

Constitutional and Statutory Provisions Involved 4

Statement of the Case 4

Reasons for Granting the Writ 8

Conclusion 18

Proof of Service 20

Appendix

Opinion and Judgment of the Court of Appeals 1a

Order of the Court of Appeals Denying Petition for Rehearing 15a

Opinion and Judgment of the District Court .. 17a

Constitutional Provisions

Tenth Amendment 37a

Relevant Parts of the Fourteenth Amendment 37a

Federal Statutes

42 U.S.C. Section 2000e-2(h) 38a

42 U.S.C. Section 2000e-2(j) 39a

INDEX (Continued)

Page

State Statute
Section 9 of Act Number 592, 1953 Regular Session of the Alabama Legislature 40a

Rules and Regulations
Section 3 of the Rules and Regulations of the Civil Service Board of the City of Anniston, Alabama 41a

CITATIONS

CASES:

Austin Independent School District v. U.S., 50 L.Ed.2d 603 (December 6, 1976) 10

Blake, et al. v. City of Los Angeles, 9 Cir. May 2, 1979, unofficially reported at 19 FEP Cases 1441 9

Bryant v. California Brewers Ass'n., 585 F.2d 421 (1978) 16

Firefighters Institute for Racial Equality v. City of St. Louis, 8 Cir. 1977, 549 F.2d 506 9

Fitzpatrick v. Bitzer, 49 L.Ed.2d 614, 96 S.Ct. 2666 (June 28, 1976) 8,11

Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) 12,15

CITATIONS (Continued)

Page

International Brotherhood of Teamsters v. United States, 52 L.Ed.2d 396, 431 U.S. 324, 97 S.Ct. 1843 (May 31, 1977) 9

McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 15

National League of Cities v. Usery, 49 L.Ed.2d 245, 96 S.Ct. 2465 (June 24, 1976) 12

Sledge v. J. P. Stevens & Co., Inc., 585 F.2d 625 (1978) 17

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 15

United States v. City of Chicago, 7 Cir. 1978, 573 F.2d 416 9

Village of Arlington Heights v. Metropolitan Housing Development Corporation, 50 L.Ed.2d 450, 975 S.Ct. 555 (January 11, 1977) 10,11

Washington v. Davis, 48 L.Ed.2d 597, 96 S.Ct. 2040 (June 7, 1976) 10,12

CONSTITUTIONAL PROVISIONS:

Tenth Amendment 4,37a

Relevant parts of Fourteenth Amendment 4,7,8, 11,37a-38a

FEDERAL STATUTES:

28 U.S.C. Section 1254(1) 3

CITATIONS (Continued)

Page

42 U.S.C. Section 2000e-2(h) 8,9,10, 13,14,18,38a-39a

42 U.S.C. 2000e-2(j) 14,39a-40a

STATE STATUTES:

Section 9 of Act Number 592, 1953 Regular Session of the Alabama Legislature 4,5, 40a-41a

RULES AND REGULATIONS:

Section 3 of the Rules and Regulations of the Civil Service Board of the City of Anniston, Alabama 4,5,41a-42a

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

CITY OF ANNISTON, ALABAMA, et al.,
Petitioners,

versus

MACK SCOTT, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, City of Anniston, Alabama, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in Mack Scott, et al. vs. The City of Anniston, Alabama, et al., on June 25, 1979. In addition to the City of Anniston, Alabama, the petitioners are Norwood Hodges, Gertrude R. Williams, Pink Junior Wood, Charles A. Daugherty, and John W. Norton, being the Mayor and

Councilmen of the City of Anniston, the Civil Service Board of the City of Anniston, Alabama, Julia Hinton, Ellis Greer and Robert Bruce Propst, being the Chairman and members of said Civil Service Board. The respondents are Mack Scott, Edward A. Spears and Earnest Hall, individually and on behalf of persons similarly situated in the Public Works Department of the City of Anniston, Alabama.

OPINIONS BELOW

The opinion and ensuing judgment of the Court of Appeals in Mack Scott, et al. v. City of Anniston, Alabama, et al., are not yet officially reported, and they appear in the Appendix at pp. 1a-15a, infra. The order of the Court of Appeals denying the petition for rehearing by the petitioners is unreported, and appears in the Appendix at pp. 15a-16a, infra.

The opinion by the United States District Court for the Northern District of Alabama, Eastern Division, and the order of final judgment entered thereon holding in favor of the petitioners are dated March 31, 1977, and they appear in the Appendix at pp. 17a-38a, infra. The opinion of said District Court is reported in 430 F.Supp. 508.

JURISDICTION

The date of the judgment of the Court of Appeals for the Fifth Circuit is June 25, 1979, and it was entered on

June 25, 1979. A timely petition for rehearing was denied by order of the Court of Appeals dated July 13, 1979. This petition for certiorari is being filed within 90 days after July 13, 1979. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether employees of a municipal corporation who are hired, classified, promoted, transferred, demoted, removed, and whose salaries are fixed pursuant to a bona fide merit system established by virtue of an act of a state legislature must prove a discriminatory intent because of race, color, religion, sex, or national origin to make a prima facie case against a local government in a Title VII action?

2. Whether a Title VII plaintiff must prove intentional discrimination in an action against a governmental unit?

3. Whether in a Title VII action a defendant governmental unit can refute a prima facie case of discrimination by presenting credible, contradictory evidence?

4. Does Title VII shift the burden of proof against a municipal employer upon showing of "adverse impact" on a personnel test despite rebuttal evidence that such impact is not probative of purposeful discrimination, or is such interpretation inconsistent with either

Title VII or constitutional concepts of federalism or the Tenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment and relevant parts of the Fourteenth Amendment to the United States Constitution are set forth in the Appendix at pp. 37a-38a, infra. Relevant provisions of Title VII of the Civil Rights Act of 1964, as amended, U.S.C. 2000e et seq. are set forth in the Appendix at pp. 38a-40a, infra.

Section 9 of Act Number 592 of the 1953 Regular Session of the Alabama Legislature creating a civil service board for the City of Anniston, Alabama, is set forth in the Appendix at pp. 40a-41a, infra. Section 3 of the Rules and Regulations of said Civil Service Board is set forth in the Appendix at pp. 41a-42a, infra.

STATEMENT OF THE CASE

This action was brought in the United States District Court for the Northern District of Alabama, Eastern Division, by Mack Scott, Edward Spears and Earnest Hall, individually and on behalf of a class of persons similarly situated wherein they allege racial discrimination in their employment in violation of Title VII of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. Section 2000e et seq., and under the Civil Rights Act of 1871, 42 U.S.C. Section 1983.

The hiring, promotion, salary, and removal of employees in the Public Works Department of the City of Anniston are covered by a Civil Service Act passed by the Legislature of the State of Alabama in 1953. Appendix pp. 40a-41a, infra. Said Act creates a Civil Service Board of the City of Anniston and provides among other things, that the Board shall have the power to make rules and regulations governing examinations, eligible registers, appointments, transfers, salaries, demotions, annual and sick leave, and such other matters as may be necessary to accomplish the purpose of the Act; that all employees shall be appointed upon a nonpartisan merit basis; that said Board "shall (1) classify the different type of services to be performed in the service of the City; (2) prescribe qualifications, including those of education, training, and experience, for the appointees and incumbents of each class; (3) with the approval of the appointing authority, fix a maximum and minimum salary for each class; and (4) allocate each job in service to its proper class." The Act further provides that the salary to be paid to each employee shall be within the pay plan and pay rules and regulations established by the Board and shall be no more than the Board approves; and that examination shall be practical in character and shall relate to those matters which test the ability of the person examined to discharge intelligently the duties of the position for which he applies.

Pursuant to said Act, the Civil Service Board has adopted rules and regulations which, in part, provide

that examinations may be oral or written or both, and may contain performance tests where the Board deems necessary.

The District Court held that the respondents established a prima facie case through the use of statistical comparisons. The Court then said that the petitioners may overcome a prima facie case by producing credible, contradictory evidence, but are not required to produce a preponderance of such evidence.

Title VII was amended in 1972 to include State and local political subdivisions. This was approximately three years before the present action was filed.

Prior to 1972, the Civil Service Board had already decided that the written examinations given by the Board showed that a large percentage of those who were failing the examinations were black. The City of Anniston caused a job study to be made, and ten blacks were promoted to Equipment Operator I without a written examination and their promotions were based on performance. Since 1971, only one written examination has been given by the Board for Equipment Operator I. On this examination, two whites passed and two blacks failed. The two whites were not appointed and the eligible list was abolished. A performance test was then given, and the two blacks who had failed the written examination passed and were given the jobs. There were no written examinations after 1975.

The petitioners affirmatively attempted to recruit blacks through meetings with the black leaders of the community, and through campaigns carried on through the media. Eligible lists were abolished when they no longer contained blacks for appointment even though the time for which the eligible lists were valid had not expired.

The District Court held that the petitioners had met the burden of overcoming the respondents' prima facie case by producing credible, contradictory evidence, and petitioners' evidence had refuted any inference of a discriminatory racial intent on the part of the petitioners.

In its order dated March 31, 1977, the District Court entered judgment in favor of the petitioners.

The dismissal of the class action by the District Court was reversed by the Court of Appeals and the case remanded to the District Court for further proceedings consistent with the opinion of the Court of Appeals. The Court of Appeals affirmed the District Court's decision denying Mack Scott's individual claim. The Court of Appeals held that proof of intentional discrimination is not essential to recovery in a Title VII action even when the employer is a governmental agency.

The Court of Appeals said that the Fourteenth Amendment empowers Congress to enact appropriate legislation to establish more exacting requirements

than those minimum safeguards provided in the amendment. The District Court cited the case of *Fitzpatrick v. Bitzer*, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) as authority through Section 5 of the Fourteenth Amendment for Congress enacting the 1972 amendment to Title VII to extend coverage to the states and political subdivisions thereof as employers. The District Court said it is, therefore, simple logic that a statute can be no broader than its constitutional base. Since the Fourteenth Amendment requires purposeful intent, Title VII requires purposeful intent.

In its motion for rehearing before the Court of Appeals the petitioners pointed out that said Court had overlooked one of the main points of petitioners' argument that 42 U.S.C. Section 2000e-2(h) expressly provides that notwithstanding any other provision of Title VII, it shall not be an unlawful employment practice for an employer to apply different standards of compensation for different terms, conditions, or privileges of employment pursuant to a bona fide merit system provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

REASONS FOR GRANTING THE WRIT

There are important questions of Constitutional and federal law which have not been, but should be, settled by the Supreme Court of the United States. The Supreme Court has never directly decided the question of "impact" versus "intent" in its prior decisions in an action against a governmental unit. Nor has the Supreme Court interpreted 42 U.S.C. Section 2000e-2(h) concerning employment by a municipality pursuant to a bona fide merit system. Only three circuits have ruled that a Title VII plaintiff need not prove intentional discrimination in an action against a governmental unit. *United States v. City of Chicago*, 7 Cir. 1978, 573 F.2d 416, *Firefighters Institute for Racial Equality v. City of St. Louis*, 8 Cir. 1977, 549 F.2d 506, and *Blake, et al. v. City of Los Angeles*, 9 Cir. May 2, 1979, unofficially reported at 19 FEP Cases 1441.

The question presented in this appeal has a direct effect upon all the cities in the United States which operate under a merit system or Civil Service Board. Although the Supreme Court has expressly held that discriminatory intent need not be shown in a Title VII action when a private employer is involved, it has not yet extended the holding to a governmental agency. *International Brotherhood of Teamsters v. United States*, 1977, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396. To so hold would have a crippling effect upon all the cities in the United States.

For example, under the statistical data put into evidence in the instant case by the respondents, the amount of damages would be shown by adding up the total wages of all black employees in all job classifications of the City and dividing this sum by the number of black employees. The total wages paid to whites in all

job classifications would be added up and an average taken in the same manner. The difference between the average wages paid blacks and the average wages paid whites would be the amount of damages suffered.

If the City is unable to show that it did not intentionally discriminate against an employee, it would in effect overlook a bona fide merit system as described in 42 U.S.C. Section 2000e-2(h), and would have the effect of doing away with job related qualifications.

The general standard for establishing a prima facie case of employment discrimination in Federal Court under Title VII, or 42 U.S.C., Sections 1981, 1983, in past years has been simply couched in terms of impact. However, as to public bodies, this view was dispelled by the Supreme Court in *Washington v. Davis*, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). In examining the adverse racial impact of the entrance exam given by the Washington, D.C., Police Department, the Supreme Court held that a showing of intent was necessary to make out a prima facie case against a local government. Further application of the Supreme Court's standard of intent other than impact are found in *Austin Independent School District v. United States*, 50 L.Ed.2d 603 (1976) and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 975 S.Ct. 555, 50 L.Ed.2d 450 (1977).

In the case of *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 50 L.Ed.2d 450 (1977) the Supreme Court said:

> "Our decision last term in Washington v. Davis, 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. Disproportionate impact is not irrelevent, but it is not the sole touchstone of an invidious racial discrimination. Id. At 242, 48 L.Ed.2d 597, 96 S.Ct. 2040, proof of racially discriminatory intent, or purpose is required to show a violation of the Equal Protection Clause. Although some contrary indications may be drawn from some of our cases, the holding in Davis reaffirmed a principal well established in a variety of contexts."

Whether the extension of Title VII to state and local government employment means that impact will not suffice and intent is currently the factor, is decidedly an open question. It hinges upon what constitutional grant of power Congress has relied upon in extending the coverage of Title VII over State and local governments. If Congress is sure, as in *Fitzpatrick v. Bitzer*, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), to have extended Title VII in implementation of the Fourteenth Amendment, no more stringent standard would be appropriate than that for which the Fourteenth Amendment calls, i.e., intent. If Congress is alternatively assumed to have acted in the exercise of its power to regulate interstate commerce, one comes to the Supreme Court's decision in *National League of Cities v. Usery*, 96

S.Ct. 2465, 49 L.Ed.2d 245 (1976), in which the Court struck down an attempt by Congress to regulate employment decisions of state and local governments under the Commerce Clause powers of Congress. Without the Commerce Clause as an appropriate alternative basis it would appear that Congress' extension of Title VII to state and local governments cannot supplant the intent standard of *Washington v. Davis*, supra, with the more stringent impact standard of *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

The District Court in the instant case of *Scott, et al. v. City of Anniston, et al.*, 430 F.Supp. 508, said:

> "Therefore, it is simple logic that a statute can be no broader than its Constitutional base. Consequently, since the extension of Title VII to State and local government rests upon the fourteenth amendment, the Statute cannot be any broader than the Constitutional authority upon which it is based. It follows that in Title VII cases against a state or local government the statute is to be construed in accordance with the Constitutional test adopted by the Court in Washington, Supra; i.e., there must be proof of discriminatory racial purpose."

The petitioners adopt the reasoning of the District Court in its decision, which is set out in the Appendix at pp. 17a-36a, infra.

The Court of Appeals said in its opinion as follows:

> "Thus, even if Title VII were enacted pursuant to Fourteenth Amendment powers alone, a question we need not here decide, Congress is authorized to enact more stringent standards than those provided by the Fourteenth and Fifteenth Amendments in order to carry out the purpose of those amendments."

It is without dispute that the City of Anniston, Alabama, has had a merit system in operation since 1953. 42 U.S.C. 2000e-2(h) expressly provides that notwithstanding any other provision of Title VII, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide merit system provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

The relevant provisions of said Section 2000e-2(h) are:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of

employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

Also, 42 U.S.C. 2000e-2(j) provides as follows:

"Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

In *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817, the Supreme Court quoting from *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849, said "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he *is* a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

Mr. Justice White, in delivering the opinion of the Supreme Court of the United States in the case of *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113, at pp. 129 and 130 wrote:

"Our conclusion is supported by the fact that seniority systems are afforded special treatment under Title VII itself. Section 703(h) provides in pertinent part:

" 'Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice of an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion,

sex, or national origin . . .' 42 USC §2000e-2(h) [42 USCS §2000e-2(h].

" '[T]he unmistakable purpose of §703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII.' Teamsters v. United States, 431 U.S. 324, 352, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977). See also United Air Lines, Inc. v. Evans, 431 U.S. 553, 52 L.Ed.2d 571, 97 S.Ct. 1885 (1977). Section 703(h) is 'a definitional provision; as with other provisions of §703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not.' Franks v. Bowman Transportation Co., 424 U.S. 747, 758, 47 L.Ed.2d 444, 96 S.Ct. 1251 (1976). Thus, absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."

The United States Court of Appeals for the Ninth Circuit in the case of *Bryant v. California Brewers Ass'n.*, 585 F.2d 421 (1978) at pp. 425 and 426 stated:

> "After this case was first briefed and argued, the Supreme Court decided three cases bearing on the Title VII claim: United Air Lines v. Evans, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); East Texas Motor Freight

> Systems Inc. v. Rodriguez, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977); and International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). These cases hold that a bona fide seniority system that applies equally to all workers and is free of an intent to discriminate on the basis of race, color, religion, sex, or national origin in its genesis, negotiation, and maintenance is immunized by §703(h) of Title VII, 42 U.S.C. §2000e-2(h), even though the system perpetuates the effects of racial discrimination predating the effective date of Title VII."

Also, the United States Court of Appeals for the Fourth Circuit in the case of *Sledge v. J. P. Stevens & Co., Inc.*, 585 F.2d 625 (1978) at p. 636 stated:

> "International Brotherhood of Teamsters v. United States, 431 U.S. 324, 343-357, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), decided after the decision below, found in §703(h) of Title VII, 42 U.S.C. §2000e-2(h), a narrow exception to the broad coverage of that title, and held that a seniority system which applies evenly to all races, and which was negotiated and maintained free from any discriminatory purpose, does not itself violate Title VII, even though it perpetuates the effects of past discriminatory practices."

We submit that in using the words "merit system" in said Section 2000e-2(h), Congress intended that a bona fide merit system is as much a limitation on the broad coverage of Title VII as is a bona fide seniority system.

The instant proceeding applies only to the Anniston Public Works Department. The Public Works Department is composed of approximately 144 employees. The department has 26 separate and distinct job classifications — labor, utility laborers, and Equipment Operator I. In these classifications 57.5% are black and 42.5% are white.

There are only 38 employees in the other 23 job classifications and most of these other classifications have only one person to fill them. There are very few openings in these classifications and most of these classifications have been held by a single employee long before 1972.

CONCLUSION

The decision rendered by the Court of Appeals for the Fifth Circuit is critical to local governments through the country. There have been conflicting decisions on the question of "impact" versus "intent." A decision by the Supreme Court of the United States would put to rest the question of whether plaintiffs must show intent under Title VII in its application to local governments.

For all of these reasons, the petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

RICHARD B. EMERSON
Post Office Box 1850
Anniston, Alabama 36202
Telephone (205) 237-9586

JOHN R. PHILLIPS
8th Floor Commercial
National Bank Building
Anniston, Alabama 36201
Telephone (205) 237-7556

PROOF OF SERVICE

We, Richard B. Emerson and John R. Phillips, counsel for the petitioners and members of the Bar of the Supreme Court of the United States, hereby certify that we have served three copies of the petition for a writ of certiorari on Honorable George C. Longshore, counsel for respondents in this proceeding, by depositing said three copies in a United States post office, with first class postage prepaid, addressed to him at 409 North 21st Street, Birmingham, Alabama 35203, his post office address. We further certify that all parties required to be served have been served.

This the ____ day of September, 1979.

RICHARD B. EMERSON
Post Office Box 1850
Anniston, Alabama 36202
Telephone (205) 237-9586

JOHN R. PHILLIPS
8th Floor Commercial
National Bank Building
Anniston, Alabama 36201
Telephone (205) 237-7556

COUNSEL FOR PETITIONERS

APPENDIX

SCOTT v. CITY OF ANNISTON, ALA.

Mack SCOTT et al.,
Plaintiffs-Appellants,

versus

The CITY OF ANNISTON, ALABAMA, et al.,
Defendants-Appellees.

No. 77-1979

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JUNE 25, 1979.

Appeal from the United States District Court for the Northern District of Alabama.

Before MORGAN, FAY and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

In this Title VII class action,[1] brought on behalf of black employees of the Public Works Department of the City of Anniston, Alabama, many of the issues turn on whether it suffices, in order to prevail, that plaintiffs prove discrimination alone or whether they must

1 42 U.S.C. §2000e *et seq.*

in addition prove that it was purposeful. We hold, on both principle and authority, that proof of intentional discrimination is not essential to recovery in a Title VII action even when the employer is a governmental agency, and that the requirement of equal employment opportunity prohibits all invidious employment practices, even those not intended to achieve a prohibited end.

Turning to the other issues in the case, we find that a prima facie case of discrimination was proved, and that the defendants failed to refute it; therefore, we remand the class action for further proceedings.[2] However, because substantial evidence supports the trial court's factual determination that Mack Scott's discharge was not motivated by racial discrimination, we affirm the holding of the district court denying him relief. We reach these conclusions for reasons explained below.

I.

Discriminatory intent must be shown in fourteenth-amendment actions against government agencies. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 1977, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450, 464; *Washington v. Davis*, 1976, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597. *See also Austin Independent School District v. United States*, 1976, 429 U.S. 990,

2 The class certified by the district court comprises "all past, present, and future employees in the public works department of the City of Anniston who were at work on or after December 2, 1972."

97 S.Ct. 517, 50 L.Ed.2d 603 (per curiam). As a result, the trial court in the present case reasoned that intent is also a prerequisite to success in Title VII actions against such agencies; it considered that, notwithstanding the power granted Congress by the fourteenth amendment, the legislature could not by statute create a right of action subject to less stringent requirements than those imposed by that amendment alone. We cannot accept that assumption.

Washington, supra, held that to prevail under Section 1981[3] a plaintiff must prove discriminatory purpose. Section 1981 grants all persons the same right to contract as is enjoyed by white citizens. It, therefore, implements directly the equal protection guarantees of the fourteenth amendment. The Court did not distinguish the elements required to recover from governmental agencies from those that must be shown against private persons. The Court did expressly distinguish, however, between the standards applicable under the Fair Employment Practices Act and those controlling under the fourteenth amendment. 426 U.S. at 239-40, 246-47, 96 S.Ct. at 2047, 2051, 48 L.Ed.2d at 611, 612. This distinction has been reaffirmed in a recent case in which the Court expressly noted that discriminatory intent need not be shown in a Title VII action. *International Brotherhood of Teamsters v. United States*, 1977, 431 U.S. 324, 97 S.Ct. 1843, 1861, 52 L.Ed.2d 396, [involving a private employer].

3 42 U.S.C. §1981.

Two circuits have expressly ruled that a Title VII plaintiff need not prove intentional discrimination in an action against a governmental unit. *United States v. City of Chicago*, 7 Cir. 1978, 573 F.2d 416, 420-24; *Firefighters Institute for Racial Equality v. City of St. Louis*, 8 Cir. 1977, 549 F.2d 506, 510, *cert. denied sub nom. United States v. Banta*, 434 U.S. 819, 98 S.Ct. 60, 54 L.Ed.2d 76. *See also Davis v. County of Los Angeles*, 9 Cir. 1977, 566 F.2d 1334, 1341 n.14 *vacated as moot*, 1979, ____ U.S. ____, 99 S.Ct. 1379, 59 L.Ed.2d 652. This circuit has made the same observation in dicta. *See Grigsby v. North Mississippi Medical Center*, 5 Cir. 1978, 586 F.2d 457, 461. Neither the Supreme Court nor any circuit court has held that Title VII imposes different requirements depending upon whether the suit is against a governmental employer or a private litigant. We see no reason to initiate such a distinction.

The fourteenth amendment empowers Congress to enact appropriate legislation establishing more exacting requirements than those minimum safeguards provided in the amendment. *Katzenbach v. Morgan*, 1966, 384 U.S. 641, 651, 86 S.Ct. 1717, 1723-24, 16 L.Ed.2d 828. The plaintiff in *Katzenbach* argued "that an exercise of congressional power under §5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce." *Id.* at 648, 86 S.Ct. at 1722, 16 L.Ed.2d at 834. In rejecting this argument, the Court noted that "[i]t would

confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of §1 of the Amendment." 384 U.S. at 648-49, 86 S.Ct. at 1722, 16 L.Ed.2d at 834. The judicial task is limited to determining whether legislation enacted pursuant to the authority conferred by the fourteenth amendment is, as required by §5, appropriate to enforce the equal protection clause. 384 U.S. at 649-50, 86 S.Ct. at 1723; 16 L.Ed.2d at 834-835.

In addition to enacting a constitutional standard, the fourteenth and fifteenth amendments granted significant power to Congress. *See, e.g., Fitzpatrick v. Bitzer*, 1976, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614; *Oregon v. Mitchell*, 1970, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (opinion of Black, J., announcing judgments of the Court); *South Carolina v. Katzenbach*, 1966, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769; *Ex parte Virginia*, 1880, 100 U.S. 339, 25 L.Ed. 676. As the Court noted in *Fitzpatrick, supra*, "these Amendments 'were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress.' " 427 U.S. at 454, 96 S.Ct. at 2670, 49 L.Ed.2d at 620, *quoting Ex parte Virginia, supra*, 100 U.S. at 345, 25 L.Ed. at 679. Thus, even if Title VII were enacted pursuant to fourteenth-amendment power alone, a question we need not here decide, Congress is authorized to enact more stringent standards than

those provided by the fourteenth and fifteenth amendments in order to carry out the purpose of those amendments.

Title VII is unquestionably appropriate legislation to enforce the equal protection clause. In *Griggs v. Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, the Court noted that Title VII was intended to carry out the objectives of the fourteenth amendment, and that the "disproportionate impact" standard was an appropriate means of fulfilling those objectives. It added:

> Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

401 U.S. at 430, 91 S.Ct. at 853, 28 L.Ed.2d at 163.

The decision in *National League of Cities v. Usery*, 1976, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245, which was cited by the district court, does not require a different result. The plaintiffs there challenged 1974 amendments to the Fair Labor Standards Act of 1938 extending its minimum wage and maximum hour provisions to almost all employees of states and their political subdivisions. The Court held that, to the extent the amendments operated directly to displace the states' ability to structure employer-employee relationships in

areas of traditional governmental functions, they were not within the authority granted Congress by the commerce clause. The Court stressed that Congress was seeking to wield its power "in a fashion that would impair the States' 'ability to function effectively in a federal system'." *Id.* at 852, 96 S.Ct. at 2474, 49 L.Ed.2d at 257, *quoting Fry v. United States*, 1975, 421 U.S. 542, 547 n.7, 95 S.Ct. 1792, 1796, 44 L.Ed.2d 363, 369. It concluded that this legislation would have effects that would "not comport with the federal system of government embodied in the Constitution." *Id.*

Title VII relies at least in part on fourteenth-amendment prerogatives. *Fitzpatrick v. Bitzer, supra*, 427 U.S. at 453 n.9, 96 S.Ct. at 2670, 49 L.Ed.2d at 620. Its impact on state and local governments does not impair their ability to function effectively in a federal system. Thus, in *Firefighters Institute for Racial Equality v. City of St. Louis, supra*, the Eighth Circuit noted in dicta that *Usery* was "undoubtedly inapposite" to Title VII, *see* 549 F.2d at 510 n.5, an observation with which we agree. Title VII intrudes less than minimum wage legislation on the role of state and local governments, places a less stringent financial burden on them, and reflects a more important national purpose — that of ending discrimination.

For these reasons, we hold that, whether the employer be private or public, the same prerequisites to Title VII liability apply, and discriminatory purpose need not be shown. Following this standard, we review the facts.

II.

This action was brought by three black employees of the Public Works Department of the City of Anniston, individually and on behalf of a class of persons similarly situated, against the city, the mayor, members of the city council, the civil service board and its members. The complaint alleged racial discrimination in their employment in violation of Title VII because of testing requirements imposed by the city's civil service board in connection with the determination of promotions within the department. In addition, Mack Scott, one of the named plaintiffs, alleged that he was discriminatorily discharged. The parties stipulated that the action was appropriate for class treatment.

At the trial, the plaintiffs offered the results of some of the tests and the testimony of several class members. Only four of the 17 blacks who had taken the test for the position of Equipment Operator I had passed while all 22 whites taking the same test had passed. Blacks had failed other tests in significantly greater numbers than white employees, and there were wage differentials between black and white employees.

The defendants presented evidence that nine of ten individuals promoted to the position of Equipment Operator I in 1971, prior to the first administration of the written test for this position, were black; these ten were required to take only an oral examination. The defendants also showed that, of those 13 blacks who failed to pass the Equipment Operator I test, at least

four were later given a performance test, which they passed, and were then promoted. There was evidence of other efforts by the city to see that blacks were promoted: eligibility lists were terminated as soon as all eligible blacks were taken; all blacks making the eligibility lists were always employed; and meetings were held with black civic leaders at which these leaders were urged to encourage black persons to apply for employment. Moreover the written tests have apparently not been given since 1975 or 1976.

Nonetheless the fact remains that there were 26 positions in the department but there were black employees in only the three classifications employing the least skilled and the greatest number of persons. The city suggests that this is because many of the employees in the other 23 classifications were hired years ago and have seniority. However, the persons in at least five of these classifications, Director of Public Works, Equipment Maintenance Supervisor, Engineer Aide I, Clerk II, and Auto Mechanic, were appointed on or after September 17, 1970. For example, all six persons classified as Auto Mechanics were appointed on or after May 12, 1971. Although two of the four white Equipment Operator III's were appointed before 1970, the other two were appointed after 1972.

Taken as a whole, the evidence supports the trial court's finding that the defendants' tests and practices were discriminatory in their impact. The city did make some efforts to alleviate that result, but the efforts were not effective.

III.

Once the racially adverse impact of an examination is demonstrated by statistical or other evidence, the burden of proof shifts to the employer to prove that the exam is job-related. *Albemarle Paper Co. v. Moody*, 1975, 422 U.S. 405, 426, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280, 301. *See Griggs v. Duke Power Co., supra*, 401 U.S. at 432, 91 S.Ct. at 854, 28 L.Ed.2d at 164. Employment *practices* having a racially adverse effect are subject to the same scrutiny: if a prima facie case of discriminatory practice is shown, it becomes the employer's burden to demonstrate the job performance validity of its practices. *Washington v. Davis, supra*. The employer's burden is not satisfied by establishing merely a rational basis for a test; the test must be validated. *Washington v. Davis, supra*, 426 U.S. at 247, 96 S.Ct. at 2051, 48 L.Ed.2d at 611. Validation, in general, requires a demonstration that "the qualifying tests are appropriate for the selection of qualified applicants for the job in question." *Id.* Validation by any one of a number of methods of making such a showing, *see id.* at 247 n.13, 96 S.Ct. at 2051, 48 L.Ed.2d at 611, suffices to refute statistical evidence that a test has had a disproportionate racial impact. *Id. See also Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 425-31, 95 S.Ct. at 2375-78, 45 L.Ed.2d at 300-304. The same sort of validation will rebut the inferences drawn from statistical evidence of racial discrimination based on work practices.

In finding that the defendants had refuted the plaintiff's case by presenting credible, contradictory evi-

dence, the district court supported its conclusion in part by stating that the firm from which the city purchased its tests had testified that the tests were validated. The city admits that this is incorrect: the parties had merely stipulated that the firm had *told* the city that all of the tests sold to it were validated. No evidence was presented at trial concerning how the tests had been validated, and the stipulation merely established the city's subjective good faith, not the fact of test validity.

The defendants had the burden to show validation of the tests they used. *Dothard v. Rawlinson*, 1977, 433 U.S. 321, 328, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786, 796; *Washington v. Davis, supra*. In this respect, they failed. Moreover, the evidence casts doubt on the validity of the tests. Some blacks who had satisfactorily performed jobs were demoted after they failed written tests. Other blacks who had failed written tests performed satisfactorily when they were promoted after passing a performance test.

The defendants' evidence that they had affirmatively sought to recruit blacks to be employees and to enhance their job opportunities within the city was insufficient to refute the prima facie case established by the plaintiffs' statistical evidence. There was no showing that the disparate racial impact of the written tests was effectively counterbalanced by the city's attempts to recruit blacks, by its relatively few on the job tests and by its ultimate abandonment of tests. We do not

imply that Title VII exacts determined affirmative action; we do hold that it is not a sufficient defense to racial discrimination to demonstrate that ineffective efforts were made to undo such discrimination. The vice condemned by the statute is racial discrimination in practice, and that is none the less a fault though it be wrought with innocent or benign intent.

IV.

We turn now to the discharge of Mack Scott. The city's garbage collection had been handled through a "task force" work system which allowed each individual crew to cease working for the day, regardless of the number of hours its members had worked, when they had completed collection in their assigned territory. Under this system Scott was able to hold down two jobs.

In early 1974 the employees in the public works department were informed at a department meeting that there would be a change to a system of eight-hour shifts. Scott missed this meeting and did not learn of the change until the Friday before the Monday when the new system was to be implemented. He then learned that he had been assigned a shift from 4:00 P.M. to midnight, even though his moonlighting job was from 10:00 P.M. until 6:00 A.M.

On Monday, Scott did not work his assigned shift; it was worked by James Turner. Scott asserts that he had obtained permission from his supervisor, Joe Byars, to

have a substitute work in his place, and that he had arranged for Turner to work for him in return for his taking a different shift for Turner. The defendants assert that he did not obtain permission for the substitution, that he had not made arrangements with Turner, and that he refused to work that day when approached by Arthur Hardy. They also argue that he was subsequently offered his job back, but refused to take it; however, Scott disputes this point. In any case, Scott was fired when he arrived at work the morning after he failed to work his shift.

The trial court found that Scott's failure to attend his regularly scheduled shift was a dereliction of duty on his part, and did not result from an attempt to swap shifts with another employee in the public works department. The court concluded, apparently on this basis, that Scott was fired for misconduct, and not because of his race.

There was substantial evidence that Mr. Scott did not have permission to make such a switch in job assignments, and that he refused to come to work when assigned. The trier of fact made a credibility determination that clearly was both its prerogative and its duty. The court's denial of Scott's claim is fully supported by the record.

V.

The dismissal of the class action is REVERSED and the case is REMANDED to the district court for

further proceedings consistent with this opinion. The district court's decision denying Mack Scott's individual claim is AFFIRMED.

Reversed and Remanded in Part; Affirmed in Part.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Number and Title Omitted)

D. C. Docket No. CA-75-G-0125-E

Filed: June 25, 1979

Appeal from the United States District Court for the Northern District of Alabama

Before MORGAN, FAY and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that the defendants-appellees pay to the plaintiffs-appellants the costs on appeal, to be taxed by the Clerk of this Court.

June 25, 1979

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Number and Title Omitted)

Filed: July 13, 1979

Appeal from the United States District Court for the Northern District of Alabama

ON PETITION FOR REHEARING

Before MORGAN, FAY and RUBIN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ ALVIN B. RUBIN
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

MACK SCOTT, EDWARD A. SPEARS, EARNEST HALL, individually and on behalf of all others similarly situated,

Plaintiffs,

versus CA No. 75-G-0125-E

THE CITY OF ANNISTON, ALABAMA; NORWOOD HODGES, JAMES BOYD, DR. ROBERT C. SIMMONS, DR. GORDON ROGERS and EUGENE STEDHAM, being the Mayor and Councilmen of the City of Anniston, their successors and assigns; THE CIVIL SERVICE BOARD OF THE CITY OF ANNISTON, ALABAMA; CECIL MILLER, RICHARD SAWYER, et al., being respectively the Chairman and Members of the Board, their assigns and successors in office,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a civil action for injunctive relief, damages, a declaratory judgment, attorney's fees, and other appropriate relief, brought on behalf of a class under the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. §2000e, et seq., and under the Civil Rights Act of 1871, 42 U.S.C. §1983, and predicated upon alleged violations by the defendants, The City of Anniston, Alabama, the Mayor and Councilmen of the City of Anniston, Alabama, and the Chairman and Members of the Civil Service Board of the City of Anniston, Alabama (hereinafter sometimes referred to collectively as "the defendants"). The parties have stipulated that the case is appropriate for class action treatment. The class is composed of all past, present and future black employees in the public works department of the City of Anniston who were at work on or after December 2, 1972.

The court has severed issues of back pay from the issue of liability. The class issues presently pending before the court relate to whether defendants have been guilty of racial discrimination with regard to hiring, promotion and tenure of employment. More specifically, the principal issue revolves around the defendants' promotion practices. The court will deal first with the class issues and then address itself to the individual issues involving Mack Scott, Edward A. Spears, and Earnest Hall.

The court, having fully considered the pleadings, all of the testimony, exhibits and other evidence adduced in the course of this case, and having carefully reviewed the briefs, and having heard the argument of counsel, now makes and finds the following facts and makes the following conclusions of law, pursuant to Rule 52(a), Federal Rules of Civil Procedure:

FINDINGS OF FACT

1. This action, seeking injunctive relief and damages, is predicated upon alleged violations by the defendants of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. §2000e, et seq.

2. The plaintiff, as mentioned above, is a class composed of all past, present and future black employees in the public works department of the City of Anniston, Alabama, who were at work on or after December 2, 1972, who are represented by certain named plaintiffs.

3. The defendants are The City of Anniston, Alabama, the Mayor and Councilmen of the City of Anniston, and the Chairman and Members of the Civil Service Board of the City of Anniston.

4. The public works department is composed of the following subdepartments: engineering, garage, electrical, street, sanitation, and building and grounds. There is a total of 26 jobs in the public works department, with 15 separate pay levels. As of the fourth

quarter, 1975, there was a total of 144 employees, of which 83 were white and 61 were black.

5. Historically, black employees have held only the lowest paid jobs in the public works department. Historically, blacks were relegated to labor jobs only.

6. The hiring, promotion, salary, and removal of employees in the public works department of the City of Anniston are covered by a Civil Service Act.[1] Said Act creates a Civil Service Board of the City of Anniston and provides, among other things, that the Board shall have the power to make rules and regulations governing examinations, eligible registers, appointments, transfers, salaries, demotions, annual and sick leave, and such other matters as may be necessary to accomplish the purposes of the Act; that all employees shall be appointed upon a nonpartisan merit basis; that said Board "shall (1) classify the different type of services to be performed in the service of the city; (2) prescribe qualifications, including those of education, training, and experience, for the appointees and incumbents of each class; (3) with the approval of the appointing authority, fix a maximum and minimum salary for each class; and (4) allocate each job in the service to its proper class." The Act further provides that the salary to be paid to each employee shall be within the pay plan and pay rules and regulations established by the Board and shall be no more than the Board approves; and that examination shall be prac-

1 Act No. 592, 1953 Regular Session of the Alabama Legislature.

tical in character and shall relate to those matters which test the ability of the person examined to discharge intelligently the duties of the position for which he applies.

7. Pursuant to the Civil Service Act referred to hereinabove, the Civil Service Board of the City of Anniston has adopted rules and regulations which, in part, provide that examination may be oral or written or both, and may contain performance tests where the Board deems necessary.[2]

8. The Civil Service Board purchases its written examination, when given, from Public Personnel Association in Chicago, Illinois. The defendants, independently of said Public Personnel Association, have not caused a validation study to be made of said examinations. Said Association, however, testified that pertinent examinations have been validated.

9. The department of public works for the City of Anniston has been analyzed from the standpoint of (1) incumbent white versus black in each of the 15 separate wage levels, (2) a comparison of current (fourth quarter 1975) average monthly income as broken down into year of hire, and (3) a comparison of the average income of black employees versus white employees. Of a total of 26 discrete jobs in the department, only three

2 Civil Service Act and the Rules and Regulations of the Civil Service Board of the City of Anniston, Alabama, revised 1970, page 10.

have ever been held by blacks: laborer, utility laborer, and equipment operator one. These positions are close to the lowest paying jobs in the department. In the order of ranking from the bottom, these three jobs rank three, four, and five.

The "year employed" analysis (plaintiff's exhibit 11-A) reveals a wage disparity between black and white employees which cannot be explained solely on the basis of length of service, that is, that blacks have less seniority than whites. On a decade-by-decade breakdown the following appears:

Year Employed	White	Black
1944 - 1950	4	1
1950 - 1960	8	6
1960 - 1970	22	34
1970 - 1975	18	16

Therefore, although the black employees have tended to remain at work in approximately the same numbers as whites, they have remained in lower paying jobs, while white employees have moved ahead in earnings.

Of the 26 years listed on plaintiffs exhibit 11-A, there is a basis for comparison for 13 of those years. In 12 of the 13 years whites make more than blacks, and in the remaining year (1955) income is the same. This study also reveals that the longer the employment, the greater the disparity. However, the study also shows

that the disparity has decreased from 1950 to the present time:

Year Employed	Average White	Average Black	Disparity
1944 - 1950	$ 859.00	$ 581.00	$ 278.00
1950 - 1960	1,027.00	643.00	394.00
1960 - 1970	766.00	565.00	201.00
1970 - present	684.00	544.00	130.00

The overall average disparity indicated by the table, with blacks earning a monthly average of $602.00 compared to $789.00 for whites, amounts in income to $186.70 (plaintiff's exhibit 11).

10. The defendants have affirmatively sought to recruit blacks to be employees of and to enhance their job opportunities with the City of Anniston. On numerous occasions, officials of the City have met with black leaders of the black community in the city to encourage them to have blacks apply for jobs other than laborers.

11. Historically, black applicants have done poorly on written examinations. In 1971 ten employees (nine blacks and one white) were promoted to equipment operator one by signing their names *only* on some papers and going to an oral test. In many instances where applicants, particularly blacks, failed written examinations for promotion to equipment operator one, the defendants gave performance examinations

conducted by a black equipment operator not connected with the City, and practically all of the applicants taking these performance examinations passed them. After passing the performance examinations, blacks were given preference over whites in being promoted to and given the position of equipment operator one.

12. The Civil Service Board on numerous occasions has abolished various eligibility registers or lists, either because there were no blacks originally on them or because no blacks remained on them, as a result of their having been certified to the appointing authority.

13. The court finds that the Civil Service Board of the City of Anniston does not and has not discriminated against persons on the basis of their race when such persons have appealed to the Civil Service Board as a result of personnel action taken against them. Indeed, Mr. Ellis Greer, a black, who is also a present member of the Board, and a present member of a labor union, testified that in his opinion the Board does not discriminate against whites or blacks.

14. The court finds that any black who has passed one of the job-related written examinations, regardless of his position in passing it, is in effect certified along with any other white employee — white applicants or anyone else, regardless of their standing.

15. The court will now address itself to findings of fact concerning the individual complaint of plaintiff

Mack Scott. Plaintiff Mack Scott alleged that his lost employment as a laborer in the sanitation department of the City resulted from an unlawful employment practice.

16. Due to problems and complaints concerning garbage collection, resulting from the system of garbage collection in effect at that time, the city manager of Anniston decided to put the public works department on an eight-hour work shift. The previous garbage collection system, commonly referred to as the "task force work," allowed each individual crew to cease working for the day, regardless of the number of hours they had worked, when they had completed collection in their assigned territory.

17. A meeting of the employees in the public works department was held on January 8, 1974, at which time the employees were informed of the change in working hours. Mack Scott did not attend the meeting and it was Friday, January 11, 1974, before he learned that he would have to go on an eight-hour shift. The change to the eight-hour shift became effective on Monday, January 14, 1976 (sic).

18. At the time the change from the task force to the eight-hour shift was made, Scott had a job in Blue Mountain, Alabama, where he worked from 10:00 P.M. until 6:00 A.M. His job, or shift, with the City of Anniston under the eight-hour shift was scheduled for 4:00 P.M. to 12:00 P.M., conflicting to the extent of two hours with his job at Blue Mountain.

19. The testimony conflicted at this point concerning whether plaintiff Scott attempted to swap his shift job with someone else within the sanitation department, thus allowing him to keep both the job with the sanitation department and the job at Blue Mountain. The court resolves this conflict in testimony against Mr. Scott, and finds, as did the grievance committee to which this matter was referred, that Mr. Scott's failure to attend his regularly scheduled shift on January 14, 1974, was not due to an attempt on his part to swap shifts with another employee in the sanitation department. Therefore, Mr. Scott's termination was justified and was not based upon racial considerations.

20. With respect to named plaintiff Earnest Hall, the court finds that he was employed as a laborer with the City, that he never made application for promotion in the public works department of the City of Anniston, that his employment with the City of Anniston was terminated on February 13, 1976, and that said termination was not based upon racial discrimination.

21. With respect to named plaintiff Edward A. Spears, no evidence was introduced at the trial of this matter regarding Mr. Spears, and therefore the court can make no findings concerning him other than those applicable to the class in general.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this cause under the Civil Rights Act of 1964, as amended in 1972, Title VII, 42 U.S.C. §2000e, et seq.

2. Alleging racial discrimination under Title VII of the 1964 Civil Rights Act with regard to hiring, promotion and tenure of employment, the plaintiff initially must establish a prima facie case of discrimination before the burden of producing evidence shifts to the defendants. *James v. Stockham Valves & Fittings Co.*, 394 F.Supp. 434 (N.D. Ala. 1975).

3. The general standard for establishing a prima facie case of employment discrimination in federal court under Title VII, or 42 U.S.C. §§1981, 1983, in past years has been simply couched in terms of impact. However, as to public bodies, this view was recently dispelled by the Supreme Court in *Washington v. Davis*, ____ U.S. ____, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). In examining the adverse racial impact of the entrance exam given by the Washington, D.C. police department, the Court held that a showing of intent was necessary to make out a prima facie case against a local government. It is important to note that the racial impact of the entrance exam in this case was challenged solely on Constitutional grounds under 42 U.S.C. §1981. Further applications of the Supreme Court's standard of intent rather than impact are found in *Austin Independent School District v. United States*, ____ U.S. ____, ____ S.Ct. ____, 50 L.Ed.2d 603 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, ____ U.S. ____, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

4. As of this date, *Harrington v. Vandalia-Butler Board of Education*, 418 F.Supp. 603 (S.D. Ohio 1976), is the only

decision addressing the issue of whether the intent standard of *Washington v. Davis, supra*, should be applied in cases brought against state and local governments under Title VII. In that case, the federal district court in Ohio held that a female teacher of girls' physical education was not required to prove intentional acts of discrimination in order to recover under Title VII of the Civil Rights Act for disparity of working conditions. In stating simply that the plaintiff did not have to prove intentional acts of discrimination on the part of the defendants, the court failed to explicitly define an appropriate standard to be followed under Title VII. Instead, it completely ignored a genuine analysis of the facts and legal concepts, and casually stated that there was nothing in *Washington v. Davis, supra*, to support the proposition that the plaintiff (in the *Harrington* case) must prove intentional acts of discrimination in order to recover under Title VII. However, there is nothing in *Washington* which supports the premise that the plaintiff does not have to prove intentional acts of discrimination in order to recover under Title VII. The court in *Harrington* attempted to support its ruling by circuitously reasoning that *Washington* reaffirmed the decision of *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

To the contrary, the Supreme Court, in commenting on the standard to be applied under Title VII, stated simply:

> "We have never held that the Constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." *Washington v. Davis*, 48 L.Ed.2d 597, 607.

Moreover, the court in *Harrington* attempted to support its ruling by incorrectly asserting that *Washington v. Davis, supra,* reaffirmed the decision of *Griggs v. Duke Power Company, supra.* In quoting language from *Griggs,* i.e., "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation," 401 U.S. at 432. 91 S.Ct. at 854, the court in *Harrington* misled the reader to believe that the Supreme Court had included the above quote in its opinion of *Washington v. Davis, supra.* To the contrary, the Supreme Court made no such statement in *Washington,* nor did it clearly state that the decision of *Griggs v. Duke Power Company, supra,* was reaffirmed.

5. Whether the extension of Title VII to state and local government employment means that impact will not suffice and intent is currently the factor, is decidedly an open question. It hinges upon what Constitutional grant of power Congress has relied upon in extending the coverage of Title VII over state and local governments. If Congress is seen, as is *Fitzpatrick v. Bitzer,* ____ U.S. ____, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), to have extended Title VII in implementation of the fourteenth amendment, no more stringent stand-

ard would be appropriate than that for which the fourteenth amendment calls, i.e., intent. If Congress is alternatively assumed to have acted in the exercise of its power to regulate interstate commerce, one comes to the Supreme Court's decision in *National League of Cities v. Usery,* ____ U.S. ____, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), in which the Court struck down an attempt by Congress to regulate employment decisions of state and local governments under the commerce clause powers of Congress. Without the commerce clause as an appropriate alternative basis, it would appear that Congress's extension of Title VII to state and local governments cannot supplant the intent standard of *Washington v. Davis, supra,* with the more stringent impact standard of *Griggs v. Duke Power Company, supra.*

In view of this analysis, this court believes that the intent standard, i.e., that there must be proof of discriminatory racial purpose as in *Washington v. Davis, supra,* should be applied in civil rights litigation brought under Title VII (or 42 U.S.C. §1981). The Supreme Court held in *Fitzpatrick, supra,* at 620, that the authority for the 1972 amendment extending Title VII to state and local governments was the fourteenth amendment:

> "There is no dispute that in enacting the 1972 amendments to Title VII to extend coverage to the states as employers, Congress exercised its powers under section five of the fourteenth amendment." page 220, note 9.

Therefore, it is simple logic that a statute can be no broader than its Constitutional base. Consequently, since the extension of Title VII to state and local government rests upon the fourteenth amendment, the statute cannot be any broader than the Constitutional authority upon which it is based. It follows that in Title VII cases against a state or local government the statute is to be construed in accordance with the Constitutional test adopted by the Court in *Washington, supra;* i.e., there must be proof of discriminatory racial purpose.

6. Statistical evidence in Title VII cases in this circuit has often been given critical weight. *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974). In *Ochoa v. Monsanto Company*, 473 F.2d 318, 319 (5th Cir. 1973), the court made clear that it would "accord statistical evidence great and ofttimes decisive weight." In *Rowe v. General Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972), it was said that statistics have "critical, if not decisive significance," certainly in putting on the employer the burden of justifying any apparent disparity. In *United States v. Hayes International Corp.*, 456 F.2d 112, 120 (5th Cir. 1972), the court commented that "these lopsided ratios are not conclusive proof of past or present discriminatory hiring practices; however, they do present a prima facie case." In the case of *United States v. Jackson Terminal Company*, 451 F.2d 418, 441 (5th Cir. 1971), the court held that "although the statistics do not establish a prima facie case of discrimination . . . absent explanatory evidence in the testimony, the

statistics indicated that officials have impliedly equated job classifications with race." In light of the factual situation present in this case, as evidenced by statistical comparisons and exhibits, the court finds an inference of racial discrimination from the statistics and, consequently, that the burden of going forward has shifted to the defendants.

7. The plaintiff having established a prima facie case of discrimination, the burden of producing evidence shifts to the defendants. *James v. Stockham Valves & Fittings Co.*, 394 F.Supp. 434 (N.D. Ala. 1975); *Buckner v. Goodyear Tire & Rubber Co.*, 339 F.Supp. 1108 (N.D. Ala. 1972), aff'd per curiam 476 F.2d 1287 (5th Cir. 1973). Although the plaintiffs have established a prima facie case through the use of statistical comparisons and exhibits, the inferences raised from the statistics are not conclusive proof of discrimination. *James v. Stockham Valves & Fittings Co., supra,* at page 492; *Ochoa v. Monsanto Company, supra; Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972). The weight to be given any inferences raised by statistics varies according to the correctness, completeness, and comprehensiveness of the figures proffered. *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971); *Hester v. Southern Railway*, 497 F.2d 1374 (5th Cir. 1974). Statistical evidence, while obviously probative, does not relieve the court of its obligation to determine whether plaintiffs have established the truth of their allegations. *James v. Stockham Valves & Fittings Co., supra,* at page 492. The defendants may overcome a prima facie case by producing cred-

ible, contradictory evidence, but are not required to produce a preponderance of such evidence. The risk of nonpersuasion remains at all times on the plaintiffs. *James v. Stockham Valves & Fittings Co., supra,* at page 492; *Ochoa v. Monsanto Company, supra.*

8. Title VII of the Civil Rights Act of 1964, as amended, is not retroactive in effect and does not seek to punish an employer whose employment practices prior to the effective date of said Act, had they continued, may have violated its provisions. The Act, however, proscribes employment practices to the extent they perpetuate the effects of past discrimination. *James v. Stockham Valves & Fittings Co., supra,* at page 493; *United States v. St. Louis-San Francisco Rwy.*, 464 F.2d 301 (8th Cir. 1972), cert. denied, 409 U.S. 1116, 93 S.Ct. 913, 34 L.Ed.2d 700 (1973).

9. The defendants in a civil rights case, by introducing evidence which explains their employment practices on the basis of legitimate, nonracial grounds, may refute any inferences of discrimination raised by the plaintiffs. *James v. Stockham Valves & Fittings Co., supra,* at page 493; *Buckner v. Goodyear Tire & Rubber Co., supra.* Once defendants have adequately refuted any inferences raised, the burden shifts back to the plaintiffs to come forward with further specific evidence of the discriminatory impact of the challenged practices. Plaintiffs have the burden of augmenting their statistics with other evidence showing that whites received job assignments denied blacks, that jobs were available

when blacks applied, and that blacks were passed over in favor of whites with equal or inferior qualifications. *James v. Stockham Valves & Fittings Co., supra,* at page 493; *United States v. Jacksonville Terminal Co., supra.* Further, as the court pointed out in *James, supra,* where plaintiffs failed to assume this additional burden, they also failed to carry their burden of proof on the case.

10. As pointed out above, the court finds in the case at bar that the plaintiffs have established a prima facie case through the use of statistical comparisons and exhibits, thus shifting the burden of producing contradictory evidence to the defendants. The defendants have met this burden by producing credible, contradictory evidence; the court finds that the defendants' evidence has refuted any inference of a discriminatory racial intent on the part of the defendants; thus, shifting the burden back to the plaintiffs to come forward with further specific evidence of the discriminatory intent of the challenged practices. The plaintiffs have not met this additional burden. Therefore, with respect to the class allegations presented to the court the court finds that it must deny the claims for relief on behalf of the class because of their failure to prove the requisite intent, as set out above.

11. Alternatively, the court finds that, based upon the specific facts of this case, the defendants employ justifiable job-related tests in the appropriate instances and that the defendants "lean over backwards" in an attempt to hire and promote black persons in the

public works department of the City of Anniston. When the defendants adequately refuted any inferences raised by the plaintiffs' statistical analyses, the burden shifted back to the plaintiffs to come forward with further specific evidence of discriminatory impact on the challenged practices. Under the impact test, plaintiffs have the burden of augmenting their statistics with other evidence showing that whites received job assignments denied blacks, that jobs were available when blacks applied, and that blacks were passed over in favor of whites with equal or inferior qualifications. *James v. Stockham Valves & Fittings Co., supra,* at page 493. *Buckner v. Goodyear Tire & Rubber Co., supra.* The plaintiffs did not meet this additional burden. Therefore, the court is compelled to deny the plaintiff class the relief it seeks.

12. Turning now to the individual complaint of plaintiff Mack Scott, the court finds from the evidence that Scott's termination of employment with the City, which was upheld by the Civil Service Board, was not based upon racially discriminatory reasons. Title VII makes it an unlawful employment practice for an employer to fail or refuse to hire or to discharge an employee because of his race, color, religion, sex, or national origin. Whether a discharge is based on race or color is a matter of evidence. The burden of proof rests on the plaintiff, but the burden can be shifted by a prima facie case. In *McDonald Douglas Corp. v. Greene,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court stated as follows:

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." L.Ed.2d at 677.

The *McDonald Douglas Corp.* case also stands for the proposition that proof of misconduct does not alone justify discharge in the face of proof that members of a different race have been treated differently. In the present case, the court finds that plaintiff Mack Scott was dismissed on the basis of misconduct. There has been no proof presented to the court that members of a different race have been treated differently in similar circumstances. To the contrary, several persons testified that the Civil Service Board handled appeals in employment discharge cases in a non-discriminatory manner. Indeed, Civil Service Board member Ellis Greer, a black, testified that in his opinion the Board does not discriminate against whites or blacks and that in disciplinary proceedings before the Board, "we try to base it on the merits and not the color." (R. p. 331). Accordingly, the court denies the relief prayed for by the individual plaintiff Mack Scott.

13. The court specifically finds that the dismissal of Earnest Hall was not based upon racial considerations.

14. In accordance with the foregoing Findings of Fact and Conclusions of Law, this court finds that the plaintiff class and the individual plaintiffs are not entitled to relief under the Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e, et seq. Judgment will be entered accordingly.

DONE this 31st day of March 1977.

/s/ J. FOY GUIN, JR.
UNITED STATES
DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

(Number and Title Omitted)

Filed: March 31, 1977

ORDER OF FINAL JUDGMENT

In conformity with and pursuant to the Findings of Fact and Conclusions of Law entered contemporaneously herewith, it is by the court

ORDERED, ADJUDGED and DECREED that the plaintiff class have and recover nothing of the defendants, The City of Anniston, Alabama, the Mayor and Councilmen of the City of Anniston, Alabama, and the Chairman and Members of the Civil Service Board of the City of Anniston, Alabama; and judgment is hereby entered in favor of said defendants. Costs are taxed against the plaintiffs.

DONE this 31st day of March 1977.

/s/ J. FOY GUIN, JR.
UNITED STATES
DISTRICT JUDGE
J. FOY GUIN, JR.

PERTINENT CONSTITUTIONAL PROVISIONS

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment, Sections 1 and 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

---

42 §2000e-2 — PUBLIC HEALTH & WELFARE

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of

any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Preferential treatment not to be granted on account of existing number of percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number of percentage of persons of such race, color,

religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88-352, Title VII, §703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, §8(a), (b), Mar. 24, 1972, 86 Stat. 109.

Section 9 of Act Number 592 of the 1953 Regular Session of the Alabama Legislature. Acts of Alabama, Regular Session, 1953, Volume II 838 at p. 840.

Section 9. The Board shall have power to make rules and regulations governing examinations, eligible registers, appointments, transfers, salaries, promotions, demotions, annual and sick leave, and such other matters as may be necessary to accomplish the purposes of this Act. A rule or regulation may be made effective only after a public hearing is held on the proposal thereof and after a certified copy thereof has been filed with the city clerk. All employees shall be appointed upon a non-partisan merit basis. There shall not be appointed, and the Board shall not examine, any person who is not a citizen of the United States. The Board shall: 1) classify the different types of services to be performed in the service of the city; 2) prescribe qualifications, including those of education, training, and experience, for the appointees and incumbents of each class; 3) with the approval of the appointing authority,

fix a maximum and minimum salary for each class; and 4) allocate each position in the service to its proper class. It shall provide for the periodic rating of employees according to their merit to determine whether they are maintaining standards of service. The Board shall establish rules and regulations governing dismissals, suspensions, layoffs, terminations, and leaves of absence, and the severance of an employee's relationship with the city shall be in accordance with such regulations.

Section 3 of the Rules and Regulations of the Civil Service Board of the City of Anniston, Alabama.

Section 3. Examinations.

(a) Examinations for all Civil Service positions shall be conducted by the Civil Service Board.

(b) Examinations shall take place at the City Hall in Anniston, Alabama, except in those instances where it is physically impractical to hold the examination there. In such instances the said examination shall be held in such places in Anniston, Alabama, as may be designated by the Civil Service Board.

(c) Examinations may be oral or written or both and may contain performance tests where the Board deems necessary.

(d) Public notice of all examinations shall be given by the Civil Service Board at least two weeks prior to the holding of such examinations. The notice shall state the position, qualifications, time and place of examination and such other information as the Civil Service Board may deem pertinent.

(e) Grading of examinations shall be done on the basis of 100 as a perfect score; and all applicants taking examinations must make a score of 60 or better in order to make a passing grade.

(f) Any candidate for examination under Civil Service who is found to have cheated on an exam shall be disqualified from holding any civil service position.

Supreme Court, U. S.
FILED
OCT 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-390

CITY OF ANNISTON, ALABAMA, et al,
Petitioners

vs.

MACK SCOTT, et al,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

George C. Longshore
COOPER, MITCH & CRAWFORD
409 North 21st Street
Birmingham, Alabama 35203
(205) 328-9576

Counsel for Respondents

QUALITY PRESS, INC.,—BIRMINGHAM, AL 35233

INDEX

	Page
Citation of Authorities	ii
Questions Presented	1
Statement of the Facts	1
Reasons for Denying the Writ	5

CITATION OF AUTHORITIES

CASES	Page No.
Blake v. Los Angeles, ___ F.2d ___ (9th Cir. 1979) 19 F.E.P.	7
J. I. Case Co. v. Borak, 377 U.S. 426 (1964)	5
Elrod v. Burns, 427 U.S. 347, 354 (1976)	7
Firefighters Institute for Racial Equality v. St. Louis, 549 F.2d 506 (8th Cir. 1977)	7
Griggs v. Duke Power Co., 401 U.S. 429-301	6
Neely v. Martin K. Eby Construction Co., 380 U.S. 317 (1967)	5
Scott v. Anniston, 597 F.2d 897 (5th Cir. 1979)	7
State of California v. Taylor, 353 U.S. 553 (1956)	5
Teamsters v. United States, 431 U.S. 324 (1977)	6
United States v. Chicago, 537 F.2d 416 (7th Cir. 1978)	7
Washington v. Davis, 426 U.S. 229 (1976)	6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 79-390

CITY OF ANNISTON, ALABAMA, et al.,
Petitioners

vs.

MACK SCOTT, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED

1. Whether a municipal corporation may employ non-validated written tests in the course of examining candidates for promotion.

STATEMENT OF THE FACTS

This is a case involving the use of non-validated written tests by a municipality for purposes of promotion to jobs within the Public Works Department.

The devastating effect of the testing was apparent in the segregated job structure in the Public Works Department. Of the twenty-six jobs in Public Works almost 80 percent of the black employees (48 out of 61) were found in the laborer category. See Plaintiff's Exhibit 11 attached hereto. An earnings comparison between whites and blacks further demonstrated that the wage differences that separated the two groups was an average of $186.00 per month. See Plaintiff's Exhibit 12 attached hereto.

Although the Civil Service Board's practice has been to give written tests for promotion, the Board has been willing to appoint or upgrade white employees in the Sanitation Department without examination. On May 23, 1974, the Public Works Director reclassified two white employees to the job of labor foreman who had been performing these duties without being so classified. (P.X. 2-G) On September 25, 1974, a new Equipment Operator III was appointed. When the Sanitation Superintendent's position became vacant, Mr. Mathis was given a temporary appointment. (P.X. 2-J)

Mr. Mathis is a good example of how white employees have risen without being required to take written examinations. Mr. Mathis has since 1968 risen from Equipment Operator I to Equipment Operator II to Labor Foreman to Assistant Superintendent to Superintendent while taking only the hiring examination in 1968. (R. 315-16)

The District Court found, and correctly so, both the segregated nature of the jobs and the large earnings disparity between black and white employees. See Page 21a-22a of the Appendix to the City's Petition.

Although the City is candid enough to agree that the requirement of written testing for promotion prevents black employees from advancing (City's Petition at P. 6) the City did test as late as July of 1975, a date well after the filing of the E.E.O.C. charges and six months after the filing of the lawsuit (R.268).

The City claims that the use of written examinations fell into disuse about the time the lawsuit was filed, but the record evidence fails to show a renunciation of testing:

"Q. (By Mr. Longshore:) Has the Personnel Board — well the Civil Service Board made a determination to stop giving written exams for equipment operator one, two and three?

A. No. You mean to stop giving written examinations?

Q. Uh-huh.

A. No, no decision has been made. We've just from past experience found that it's easier to test the employees with a performance examination and, of course, the rules say that they can give a written, oral or performance examination, whichever they choose, and this seems to work out." (R. 268)

The defense of a bona fide merit system (42 U.S.C.A. §20003-2(h)) was not raised by the pleadings (A.9), the Pre-Trial Order (A.10) nor was it put in issue before the District Court. Neither the District Court's decision nor that of the Court of Appeals makes any mention of a bona fide merit system defense. The issue was raised for the first time in a Petition for Rehearing to the Court of Appeals. "Under these circumstances, we see no cause for derivation from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here." *Neely v. Martin K. Eby Construction Co.*, 380 U.S. 317 (1967). Citing Supreme Court Rule 40(1) (d) (2); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); *State of California v. Taylor*, 353 U.S. 553 (1956).

As can be seen from the decisions the case was tried as a testing case with the outcome turning on whether the tests had been validated. The City lost because it had failed to validate its written tests, and because

its efforts to counteract the adverse effect of the testing had proved ineffective.

REASONS FOR DENYING THE WRIT

The Petition should be denied because (1) the Fifth Circuit's opinion is consistent with the authoritative decisions of this Court, (2) there is no split among the Circuits, and (3) the City of Anniston, unlike the defendant in *Washington v. Davis*, 426 U.S. 229 (1976), makes no claim that written testing is necessary or even desirable to qualify or upgrade its personnel. The City stated in its Pre-Trial statement of position that it would no longer employ written tests because "only a small number of the blacks were passing the written examination." (A.11) At trial it indicated a preference for performance tests. (A.124)

The Fifth Circuit's decision is altogether consistent with *Washington v. Davis, supra.* Judge Rubin, speaking for the Fifth Circuit, correctly interpreted *Washington* as distinguishing between the standards applicable to cases brought under the Civil Rights Act of 1964 and those applicable under the Fourteenth Amendment. This distinction has more recently been affirmed in a case against a private employer. *Teamsters v. United States*, 431 U.S. 324 (1977). These cases illustrate that while the purpose of the Fourteenth Amendment is the prevention of official

conduct which discriminates on account of race, the Civil Rights Act of 1964 had as its primary purpose the assurance of equal employment opportunities to individuals or groups. In *Griggs v. Duke Power Co.*, 401 U.S. 429-301, the primary objective of Title VII was said to be:

> ". . . to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

Every circuit court passing on this question has concluded, as did the Fifth Circuit, that Title VII standards for private employers should apply to the government as an employer. *United States v. Chicago,* 537 F.2d 416 (7th Cir. 1978), *Firefighters Institute for Racial Equality v. St. Louis,* 549 F.2d 506 (8th Cir. 1977), *Blake v. Los Angeles,* ___ F.2d ___ (9th Cir. 1979) 19 F.E.P. 1441, and now *Scott v. Anniston,* 597 F.2d 897 (5th Cir. 1979).

Even if the merit system defense be considered it is apparent that the term "merit system" does not embrace the use of written examinations any more than a bona fide seniority system is synonymous with written tests. Obviously, *Griggs v. Duke Power Co., supra,* survived *Teamsters v. United States,* ___ U.S. ___, 97 S.Ct. 1891 (1977). The term "merit system"

appeared in the Civil Rights Act of 1964 (78 Stat. 253) and was not changed by the 1972 amendments. (86 Stat. 103) Although the term is often used to refer to non-patronage public employment systems[1/], its inclusion in the original Act indicates that the term as used in this context does not refer to public employment, but to systems of objective measurement of work performance in non-union plants.

Respectfully submitted,

George C. Longshore
COOPER, MITCH & CRAWFORD
409 North 21st Street
Birmingham, Alabama 35203
(205) 328-9576

1/ *Elrod v. Burns,* 427 U.S. 347, 354 (1976).

CERTIFICATE OF SERVICE

I do hereby certify that I have on the day of , 1979, served a copy of the foregoing Brief on counsel for all parties to this proceeding by mailing same, postage prepaid, to:

Richard B. Emerson, Esquire
501 First National Bank Bldg.
Anniston, Alabama 36201

John R. Phillips, Esquire
410 Commercial National Bank Bldg.
Anniston, Alabama 36201

George C. Longshore

EXHIBIT 11
PLAINTIFF'S EXHIBIT:

	TOP SALARY		White	Black
1.	533.00	- Custodial Worker	2	0
2.	561.00	- Clark II	1	0
3.	563.00	- Laborer	30	48
4.	632.00	- Utility Laborer	0	3
5.	729.00	- Electrician I	1	0
6.	786.00	- Equipment Operator I	15	10
7.	842.00	- Engineer Aide I	1	0
		- Equipment Operator II	5	0
8.	897.00	- Electrician II	1	0
		- Equipment Operator III	3	0
		- Cemetary Supervisor	1	0
9.	953.00	- Labor Foreman	4	0
		- Engineer Aide II	1	0
10.	1009.00	- Asst. San. Supt.	1	0
		- Asst. Street Supt.	0	0
		- Auto Mechanic	6	0
		- Garage Supt.	1	0
11.	1065.00	- Chief Elect. Inspector	1	0
		- Chief BLP Inspector	1	0
		- Chief Elctrician	1	0
12.	1122.00	- Street Superintendent	1	0
		- B & G Superintendent	1	0
		- Sanitation Supt.	1	0
13.	1290.00	- Equip. Maintenance Supt.	1	0
14.	1401.00	- Exec. Asst. to City Engineer	1	0
15.	1870.00	- Director of Public Works	1	0
		Total	83	61
			144	

Total Jobs - 26
Whites Represented - 96%
Blacks Represented - 12%

Average Income Based on Top Pay For Job

Whites	-	789.65
Blacks	-	602.95
Discrepancy	-	186.70

7-13-79

EXHIBIT 12
PLAINTIFF'S EXHIBIT:

CURRENT AVERAGE MONTHLY INCOME

Year Employed	White	(No.)	Black	(No.)
1944	$ 876:00	(1)	$	(0)
1945	834.00	(1)		(0)
1946		(0)	581.00	(1)
1949	863.00	(2)		(0)
1951	1297.00	(1)	624.00	(1)
1952	776.00	(1)		(0)
1953	999.00	(1)		(0)
1954	826.00	(1)		(0)
1955	727.00	(1)	727.00	(1)
1957	815.00	(2)		(0)
1959		(0)	674.00	(2)
1960	1057.00	(1)	581.00	(2)
1961		(0)	581.00	(1)
1962	834.00	(1)	581.00	(1)
1963	686.00	(1)		(0)
1964	867.00	(3)		(0)
1965	686.00	(1)	623.00	(3)
1966	728.00	(1)	581.00	(3)
1967	846.00	(4)	594.00	(5)
1968	786.00	(5)	590.00	(7)
1969	759.00	(4)	571.00	(8)
1970	600.00	(2)	561.00	(6)
1971	641.00	(1)	549.00	(5)
1972	656.00	(3)		(0)
1973	626.00	(10)	553.00	(5)
1974	843.00	(4)	534.00	(6)

Supreme Court, U. S.
FILED
OCT 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-390

CITY OF ANNISTON, ALABAMA, et al.,
Petitioners,

versus

MACK SCOTT, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

RICHARD B. EMERSON
Post Office Box 1850
Anniston, Alabama 36202
Telephone (205) 237-9586

JOHN R. PHILLIPS
8th Floor Commercial National Bank Building
Anniston, Alabama 36201
Telephone (205) 237-7556

Counsel for Petitioners

October 12, 1979

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-390

CITY OF ANNISTON, ALABAMA, et al.,
Petitioners,

versus

MACK SCOTT, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

The petitioners emphatically deny the statement set forth on page 4 of the respondents' brief in opposition that the issue of the defense of a bona fide merit system was raised for the first time in a Petition for Rehearing to the Court of Appeals. Said statement is not correct.

Said issue was raised on pages 1, 23, 26 and 27 of the petitioners' brief filed in the United States Court of Appeals for the Fifth Circuit in September, 1977, being Case No. 77-1979 therein. Said issue was raised again on pages 1, 2 and 3 of a letter written by petitioners' counsel (the undersigned) dated January 23, 1979, to Honorable Edward W. Wadsworth, Clerk of said Court of Appeals. Also, said issue was raised in oral argument by petitioners' counsel before said Court of Appeals on March 8, 1979. Said Court of Appeals rendered its judgment on June 25, 1979.

There is no procedure whereby the petitioners may require said Court of Appeals to treat said issue other than to seek the aid of the Supreme Court.

Said issue was not raised in the District Court for the reason the Supreme Court decided the case (*United Air Lines, Inc., v. Evans*, 431 U.S. 553, 52 L.Ed.2d 571, 97 S.Ct. 1885) upon which the petitioners initially relied on May 31, 1977, after the District Court rendered its final judgment on March 31, 1977.

Respectfully submitted,

RICHARD B. EMERSON
Post Office Box 1850
Anniston, Alabama 36202
Telephone (205) 237-9586

JOHN R. PHILLIPS
8th Floor Commercial National
Bank Building
Anniston, Alabama 36201
Telephone (205) 237-7556

PROOF OF SERVICE

We, Richard B. Emerson and John R. Phillips, counsel for the petitioners and members of the Bar of the Supreme Court of the United States, hereby certify that we have served three copies of the foregoing reply brief on Honorable George C. Longshore, counsel for respondents in this proceeding, by depositing said three copies in a United States post office, with first class postage prepaid, addressed to him at 409 North 21st Street, Birmingham, Alabama 35203, his post office address. We further certify that all parties required to be served have been served.

This the ____ day of October, 1979.

RICHARD B. EMERSON
Post Office Box 1850
Anniston, Alabama 36202
Telephone (205) 237-9586

JOHN R. PHILLIPS
8th Floor Commercial National
Bank Building
Anniston, Alabama 36201
Telephone (205) 237-7556
COUNSEL FOR PETITIONERS